

Attorneys General.⁴² In essence, these Attorneys General envision a decision tree under section 271 [c](1). In their opinion, once a request has been made, Track A takes hold and the conditions outlined in Track A must be met.

B. DEFINING FACILITIES-BASED COMPETITION UNDER 271

After this first crucial decision point is passed, we enter into a debate over how to know that the conditions under Track A have been met (see Table 4). The key issues in the debate are

misinterpretation of the Act, however, focuses on the "no such provider" language in Track B alleging that if Brooks is on a Track A qualifying competing provider of facilities based local exchange services, then no such provider has requested interconnection and access.

Clearly, the "no such provider" language refers only to the Track A requirement that any competing provider of local exchange service must be unaffiliated with SBC. Reading that language as SBC argues would lead to absurd results. It would totally emasculate Track A's requirements by making Track B available immediately as of September 8, 1997. The only way Track A is applicable under SBC's erroneous interpretation would be if such a competing provider was operational before it even requested interconnection and access.

In seeking interLATA authority, a BOC can travel down either Track A exclusively or Track B exclusively. The road taken determines the proper vehicle in which to travel toward interLATA authority, interconnection agreement on Track A or a statement of generally available terms ("SGAT") on Track B. The vehicle used, in turn, determines the standard by which the BOC must meet the access and interconnection requirements of section 271.

The facts are that Track A has certain requirements that must be met and that SBC has failed to meet them all.

⁴² "Reply Comments of the Attorneys General of Delaware, Florida, Iowa, Maryland, Massachusetts, Mississippi, Missouri, New York, North Dakota, Oklahoma, Utah, West Virginia and Wisconsin, In the Matter of Application of SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region InterLATA Services in Oklahoma, Federal Communications Commission, CC Docket No. 97-121 (hereafter, Attorneys General), p. 7.

But as a general matter, Track B will be unavailable as a means of BOC in-region interLATA entry in a State from the time requests for interconnection and access were made until the implementation schedules included in interconnection agreement have been breached.

TABLE 4
SECTION 271 [C] (1) COMPLIANCE EVALUATION

TRACK A CONDUCT

- 1) REQUEST
- 2) GOOD FAITH NEGOTIATION
- 3) ON-TIME IMPLEMENTATION
- 4) TRACK B AVAILABLE

TRACK A CONDITIONS

- 1) PROVIDING ACCESS
- 2) APPROVED AGREEMENT
- 3) PREDOMINANTLY OWN
FACILITIES FOR BUSINESS
- 4) PREDOMINANTLY OWN
FACILITIES FOR RESIDENTIAL
- 5) SERVICE TO BUSINESS
- 6) SERVICE TO RESIDENTIAL

TRACK B

- 1) GENERALLY OFFERS TO PROVIDE
ACCESS AND INTERCONNECTION
- 1) SGAT APPROVED OR PERMITTED
TO TAKE EFFECT

COMPETITION ANALYSIS

- 1) IRREVERSIBLE

as follows:

The RBOC must actually be providing interconnection.

The agreement or agreements must be approved under section 252, which means it must be a final agreement approved by a state commission.

The competitor or competitors must be using predominantly their own facilities.

The competitors must be providing service to both business and residential customers.

While these conditions may seem straightforward, in the world of telecommunications policy even the obvious becomes obtuse. In the arguments leading up to the first applications and in the first two applications every one of the conditions was violated. The RBOCs argued that they did not have to actually be providing interconnection. Rather, merely saying something is available (offering it) is the same as actually providing it. The agreement Ameritech used in its first application had not even been signed by the competitor, not to mention approved by the state commission.

The Department of Justice and the Oklahoma Attorney General have taken a dim view of this use of hypothetical checklist items.

In evaluating an application in this regard, the Department seeks to determine whether the BOC's local markets have been irreversibly opened to competition. The Department believes that the most probative indicator of whether a local market is open to competition is the history of actual commercial entry.⁴³

And, as the Conference Report notes, the presence of an operational competitor actually using the checklist elements is important in assisting the state commission and the FCC in determining, for purposes of Section 271(d)(2)(B), that the BOC has fully implemented the checklist elements set out in Section 271[c](2).⁴⁴

⁴³ DOJ, SBC, pp. vi-vii.

⁴⁴ DOJ, SBC, p. 10.

In Oklahoma, the competitor was not using predominantly its own facilities, nor was it providing service to both classes of customers.⁴⁵

These Attorneys General believe that the specific conditions under Track A must be evaluated in the context of providing actual competition and the DOJ clearly rejects the idea that providing service to one subscriber in each customer class meets Congressional intent. The Department of Justice is placing more and more emphasis on the existence of actual competition.⁴⁶ The Wisconsin Public Service Commission has reached a similar conclusion.

⁴⁵ AG Oklahoma, p. 5.

Brooks "does not -- has not at any time served residential customers over its own facilities in Oklahoma. " Brooks serves a grand total of four residential subscribers in the entire state of Oklahoma. The local exchange service it provides to these subscribers is strictly by "[r]eselling Southwestern Bell's dial tone local exchange service." Moreover, not only is this residential service being provided only on a test basis, but each of the four subscribers are employees of Brooks. Indeed, since Brooks is not marketing residential service in Oklahoma, Brooks is not even offering facilities based local exchange service to residential subscribers at this time.

Even the local exchange service that Brooks provides to its business subscribers cannot be described as predominantly facilities based service when twelve of its twenty business customers in Oklahoma are served over tariff leased facilities owned by SBC or resold ISDN service.

⁴⁶ "Evaluation of the United States Department of Justice," In the Matter of Application by Ameritech Michigan to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Service in Michigan, CC Docket 97-1 (hereafter, DOJ, Michigan), p. 30.

In applying this standard, the Department will consider whether all three entry paths contemplated by the 1996 Act -- facilities-based entry involving construction of new networks, use of the unbundled elements of the BOC's network, and resale of the BOC's services -- are fully and irreversibly open to competitive entry to serve both business and residential customers. To do so, the Department will look first to the extent of actual local competition as evidence that local markets are open and whether such entry is sufficiently broad-based to support a presumption of openness. If broad-based commercial entry involving all three entry paths has not occurred, the Department will examine competitive conditions more carefully, and consider whether significant barriers continue to impede the growth of competition, focusing particularly on the history of actual commercial entry. We will assess the import of such entry as a means of demonstrating whether the market is open and establishing relevant benchmarks, but not as a way of requiring any specific level of

The best way to make this showing would be through proof that broad-based competitive entry into local exchange markets has been successful in the State. If broad-based entry into local exchange markets has not occurred in the State, that would not foreclose the possibility of approval of a section 271 application if the BOC can otherwise prove that there are no significant impediments to such entry.⁴⁷

The FCC takes a similar view.

The most probative evidence that all entry strategies are available would be that new entrants are actually offering competitive local telecommunications services to different classes of customers (residential and business) through a variety of arrangements (that is, through resale, unbundled elements, interconnection with the incumbent network, or some combination thereof), in different geographic regions (urban, suburban, and rural) in the relevant state, and at different scales of operation (small and large). We emphasize, however, that we do not construe the 1996 act to require that a BOCs lose a specific percentage of its market share, or that there be competitive entry in different regions, at different scales, or through different arrangements, before we would conclude that bop entry is consistent with the public interest...

Evidence that the lack of broad-based competition is not the result of a BOC's failure to cooperate in opening local markets could include a showing by the BOC that it is ready, willing, and able to provide each type of interconnection arrangement on a commercial scale throughout the state if requested.⁴⁸

While the FCC has taken a position similar to the other third party intervenors, its interpretation of specific aspects of what constitutes facilities based competition is more lax than many have argued for. The FCC has accepted separate agreements covering different elements of the 14 items, rather than requiring that all elements be covered in a single agreement.⁴⁹ It would accept separate providers serving different customer classes rather than requiring that one or more

actual local competition.

⁴⁷ "Finding of Fact, Conclusions of Law and Second Order," Matters Relating to Satisfaction of Conditions for Offering InterLATA Service (Wisconsin Bell, Inc. D/b/a/ Ameritech Wisconsin), Public Service Commission of Wisconsin (hereafter Wisconsin), p. 5.

⁴⁸ FCC Michigan, paras...391, 392.

⁴⁹ FCC Michigan, para 72.

provides serve all customer classes.⁵⁰ It would allow unbundled elements to meet the "owned facilities" requirement.⁵¹ It provided no guidelines for the scale and geographic scope of competition.⁵² It did, however, decisively reject a mere handful of customers as an adequate indicator of competition.⁵³

⁵⁰ FCC Michigan, para. 82.

⁵¹ FCC Michigan, paras. 101.

⁵² FCC Michigan, para. 76, 78..

⁵³ FCC Michigan, para. 78.

V. THE COMPETITIVE CHECK LIST

The 14 items on the competitive check list have been the ones subject to the greatest scrutiny because most of the items were identified in sections 251 and 252 of the 1996 Act. As a result, all telecommunications companies commenced working on these details. State proceedings have been initiated in just about every state. Unfortunately, there may be more uncertainty regarding these conditions than any other area of the law. Many states have not issued final rules and, where they have, they have been challenged in court.

The fundamental question is, what does full implementation on a non-discriminatory basis of the 14 point competitive checklist mean. The third party intervenors have taken a position that can be summarized as follows

Full implementation means that final rules are in place implementing equal quality service at fully commercial scale, with mechanisms in place to detect discrimination and enforce penalties to correct abuses.⁵⁴

The details that are being debated are remarkable. Table 5 summarizes the points being

⁵⁴ The Department of Justice (DOJ, SBC, pp. 23-24) stated this position as follows:

By the same token, an agreement that does not set forth complete rates and terms of a checklist item, but merely invites further negotiations at some later time, falls short of "providing" the item as required by Section 271, as does a mere "paper commitment" to provide a checklist item, i.e. one unaccompanied by a showing of the actual ability to provide items on demand... In sum, a BOC is "providing" a checklist item only if it has a concrete and specific legal obligation to provide it, is presently ready to furnish it, and makes it available as a practical, as well as formal matter.

The Oklahoma Attorney General (AG Oklahoma, p. 4) reached a similar conclusion.

The requirement that SBC must be "providing" access and interconnection demonstrates Congress' intent that such unaffiliated competing provider must be operational. "Operational" means "able to function or be used."

TABLE 5
SECTION 271 [C](2)(B) COMPETITIVE CHECKLIST
COMPLIANCE EVALUATION FOR EACH OF THE 14 CONDITIONS

FINAL RATES, TERMS, AND CONDITIONS
 CONCRETE AND SPECIFIC LEGAL OBLIGATIONS
 STATE APPROVED AGREEMENTS
 COURT CASES
 INTERIM ORDERS
 USAGE RIGHTS
COST-BASED RATES
 TELRIC OR OTHER
ACCESS TO INFORMATION AND LEGACY SYSTEMS
 PRE-ORDER
 ORDER
 PROVISION
 REPAIR AND MAINTENANCE
 BILLING
PERFORMANCE STANDARDS
 AUTOMATED
 QUALITY/RELIABILITY
 EQUAL FOR ALL
 COLLOCATION
 EXCLUSIONS
FULLY LOADED FUNCTIONING
 SUFFICIENTLY AVAILABLE
 DEPLOYED
 ACCESS IN VOLUME
 ASSISTANCE FOR USERS
 SPECIFICATIONS
 INFORMATION
 BUSINESS RULES
 OPERATIONALLY READY
 TESTS/PILOTS
 INTERNAL
 THIRD-PARTY
 INTER-CARRIER
 AUTOMATED
OVERSIGHT
 MONITORING - DATA
 ENFORCEMENT

debated. RBOCs have gone to their state commissions and the FCC asking for entry on the basis of interim orders that they themselves are appealing in the courts. In most states, the basis for establishing the prices to be charged for interconnection, unbundled elements and resold services have not been established firmly and are still subject to court challenge. There are also problems with usage rights for vital inputs to telecommunications services. Even when final rates terms and conditions are available, they have delivered very different levels of service to competitors. Performance standards have not been equalized for technical and locational reasons.

Faced with this uncertainty, competitors find it extremely difficult to make major commitments to invest in local competition. The Department of Justice has concluded that they need much more certainty than that.⁵⁵ The Department of Justice is particularly concerned about the ability of RBOCs to provide wholesale functionality -- fully loaded functioning. Competitors have found that interfaces are not in place and have not even been tested in some instances. They are not automated, so that customers seeking to change service providers are forced to experience

⁵⁵ DOJ, SBC, pp. 61-62.

Even if the issue related to SBC's support processes were adequately addressed, there could still be other obstacles to competitive entry in Oklahoma, which competitors would have to confront if they are ever able to cross the initial thresholds. For example, SBC has failed to show that its rates for unbundled elements, as established in the AT&T arbitration and as used in its SGAT, are consistent with underlying costs. The Oklahoma Corporation Commission has never found SBC's SGAT rates for unbundled elements and interconnection, or its interim arbitrated rates from which they were derived, to be cost-based... The OCC's proceeding to examine SBC's costs and set final prices will not even commence until later this summer, and it is not clear when this proceeding will be completed. Since it is not yet known what the final Oklahoma prices will be or how they will be determined, the provision for a true-up is hardly sufficient assurance that competitors will in fact be charged cost-based prices now or later

serious delays.⁵⁶

As with competitive standards, regulators at the state⁵⁷ and federal level have come to

⁵⁶ DOJ, SBC, p. vii.

SBC has failed to: (1) provide adequate wholesale support processes, which enable a competitor to obtain and maintain required check list items such as resale services and access to unbundled elements; and (2) provide (a) physical collocation, and (b) adequate interim number portability.

Actual market entry with successful commercial usage of the BOC's wholesale systems may be sufficient to demonstrate that the inputs competitors need are commercially available. Such entry also permits the formulation of performance benchmarks what will enable regulators and competitors to detect and constrain potential BOC backsliding and competitive misconduct after long distance entry. As of yet, there is no sufficient history of such entry in Oklahoma and our inquiry suggests that several significant obstacles to such competitive entry remain in place.

DOJ, SBC, p. 27.

Finally, the Department will consider whether a BOC has made resale services and unbundled elements, as well as other checklist items, practicably available by providing them via wholesale support processes that (1) provide needed functionality; and (2) operate in a reliable, non-discriminatory manner that provides entrants a meaningful opportunity to compete.

⁵⁷ Wisconsin, p. 17.

Accordingly, the Commission finds that to meet its stated "tested and operational" requirement, Ameritech must provide access to each of the following interfaces: pre-ordering, ordering, provisioning, repair and maintenance, and billing. That access must be non-discriminatory, meaning in substantially the same time and manner that an incumbent LEC provides OSS functions to itself. Access to the necessary design and operating specifications must be provided to enable CLECs to use the interfaces. The burden of proof is upon Ameritech to show that these requirements have been fulfilled. That burden of proof has not been met.

Attorneys General, pp. 8-9.

CLECs need smooth and effective communications with the BOCs' databases in order to enable effective local exchange competition. If a BOC's OSS do not function well or break down, this will impede the CLEC's ability to service its customers and the customer will blame the CLEC rather than the BOC...

A BOC's OSS capability should be required to pass at least to tests before they are deemed

focus on actual provision of service under conditions of competition. The FCC's order in the Ameritech Michigan petition sought to elaborate and give specificity to the concept of fully loaded functioning.⁵⁸ The principles it adopted were as follows.

Elements must be available subject to concrete and specific legal obligations embodied in a state approved agreement that sets the price, terms and conditions of service.⁵⁹

Rates must be based on forward looking costs, and the FCC intends to use its TELRIC methodology to determine if they are anticompetitive.⁶⁰

Competitors must have access to all processes, including interface and legacy systems (systems embedded within the incumbent's operating structure that support its services) to accomplish all phases of a transaction - - pre-order, order, provisioning, repair and maintenance, billing.⁶¹

In order to meet the requirements of the act, the elements have to be operationally

to satisfy the competitive checklist. First, the BOC must demonstrate that the systems incorporate sufficient capacity to be able to handle the volumes of service reasonably anticipated when local competition has reached a mature state. Second, the BOC's OSS capabilities must be proven adequate in fact to handle the burdens place upon them as local competition first takes root. Testing of the systems by the BOC is not enough to provide reasonable assurance that they will function as planned with the system of CLECs. It will require some experience with the systems on a day-to-day basis under conditions of local competition in order to assess their adequacy on this measure.

Finally, some record of experience under conditions of local competition is necessary to reveal whether a BOC will engage in unfair nor discriminatory practices to inhibit entry into local exchange service markets. As a provider of essential bottleneck facilities, BOCs retain considerable market power in local exchange markets. The importance of OSS is just one example of BOCs' competitive significance in these markets. BOC promises of compliance with statutory prohibitions against unfair and discriminatory practices must be confirmed in the course of confronting real and effective competition in the marketplace.

⁵⁸ FCC Michigan, summary at para. 22.

⁵⁹ FCC Michigan, para. 110.

⁶⁰ FCC Michigan, paras 280-288.

⁶¹ FCC Michigan, para. 135.

ready and sufficiently available to meet the likely demand in volume and in a manner that does not discriminate against or place competitors at a disadvantage.⁶²

The ongoing performance of the BOC in supplying the elements should be subject to monitoring and enforcement to ensure the availability of elements at all phases of the interaction with competitors.⁶³

The performance review of the BOCs became a central issue in the Ameritech proceeding.

Once companies begin to compete, their success will be largely determined by their ability to deliver service. Since they are significantly dependent on the BOCs to initiate and maintain service, their fate can be determined difference in service quality. The Department of Justice and the Michigan Commission outlined a series of points which the FCC adopted in general. The performance measures are identified in Table 6.

⁶² FCC Michigan, para. 136.

⁶³ FCC Michigan, para. 140 with data requirements described in paras. 164, 205, 206 and 212.

TABLE 6
PERFORMANCE STANDARDS FOR CHECKLIST ITEMS
INSTALLATION IN INTERVALS FOR

RESALE
LOOPS

PERFORMANCE ASSESSMENT
INTERFACE AND INTERNAL O S. S.
UNBUNDLED NETWORK ELEMENTS
PROVISION
NUMBER PORTABILITY

PERFORMANCE ASSESSMENT INCLUDING COMPARISONS WITH AMERITECH
RETAIL OPERATIONS

SERVICE ORDER ACCURACY
HELD ORDERS
BILL QUALITY
REPEAT TROUBLE REPORTS
DIRECTORY ASSISTANCE
WHITE PAGES
OPERATOR SERVICES
911

REMEDIES OR PENALTIES FOR NONCOMPLIANCE

VL AFFILIATE SAFEGUARDS

The affiliate safeguards contained in the 1996 Act are extremely detailed in their prescriptions. Beyond the traditional structural separations and requirements for arms length transactions (section 272 (b)), the 1996 Act states a series of specific requirements covering goods, services, facilities, information, and standards (section 272 9c). It goes on to stipulate non-discrimination in the time period of services, the terms, conditions, and charges for service, as well as cost allocation requirements (section 272 (e)). Table 7 presents the conditions laid down in the Act.

One would imagine that with such clear language separate subsidiaries would be in place before an application is made for entry into in-region long distance. That has not been the case. To begin with, separate subsidiaries have not been set up, nor have the terms and conditions to govern the relationship between subsidiary and parent been established.

Even where separate subsidiaries have been set up, questions have been raised about the ability of regulators to monitor and prevent discrimination and cross subsidization. Since transactions are likely to be frequent, monitoring and enforcing non-discrimination will be an ongoing and considerable task.

TABLE 7
AFFILIATE SAFEGUARDS COMPLIANCE EVALUATION SECTION 272

A. REQUIRED SAFEGUARDS

272(b) STRUCTURAL SEPARATION

- 1) INDEPENDENT COMPANY
- 2) ACCOUNTS
- 3) OFFICERS, ETC.
- 4) NON-RECOURSE IN FINANCE
- 5) ARMS LENGTH TRANSACTIONS PUBLICLY AVAILABLE

272(c) NON-DISCRIMINATION

- 1) PROCUREMENT OR PROVISION OF
GOODS, SERVICES, FACILITIES,
AND INFORMATION
- 2) ACCOUNTING PRINCIPLES

272(e) FULFILLMENT OF REQUESTS

- 1) TIME TO PROVIDE
- 2) TERMS AND CONDITIONS
CHARGES
- 3) COST ALLOCATION
- 4) COMPARABLE RATES TERMS AND CONDITIONS

272(g) PROHIBITION ON JOINT MARKETING

B. ADOPTION OF SAFEGUARDS

IMPLEMENTED
MONITORED
COMPLAINTS

C. EVIDENCE

PAST BEHAVIOR
BUSINESS PLANS
AFFILIATE ENTRY STRATEGIES
ORGANIZATIONAL CHARTS
AGREEMENTS
SCRIPTS

Important safeguards are not yet in place and would be rendered meaningless by Ameritech Michigan's entry into long distance at this time. The necessary resources for enforcement are not in place. Various structural and non-structural safeguards contained in the federal act, including critical protections related to separate affiliates and cross-subsidization, have not yet been put in place; various rules necessary for the Michigan Public Service Commission to ensure enforcement are either not yet in place or have been challenged by Ameritech Michigan and await appellate determination. Currently the MPSC and the Commission do not collect the meaningful data necessary to protect ratepayers against cross-subsidization and do not make meaningful data publicly available for review. Such authority and regulatory resources must be in place if effective competition is to emerge.⁶⁴

One example the MCF cites is the abuse of customer information to frustrate competition.

It is also disturbing to learn, for example, that Ameritech Michigan customers who contact the company to obtain information necessary for switching to Brooks Fiber, often find themselves immediately engulfed by the sales fleet at Ameritech, anxious to keep them on board even if that means making unfair and unfounded disparaging comments about the competitor. Apparently Ameritech is boldly and routinely taking inquiries from its customers, questions posed in anticipation of switching carriers, and then immediately sharing that information with the sales team of the unregulated operation.⁶⁵

A similar complaint was lodged against Bell South in Georgia when it first entered the information services industry.⁶⁶

The Michigan Consumer Federation stresses a number of specific steps that should be taken prior to authorization of RBOC entry. These include the adoption of cost allocation rules between local and long distance, structures to protect telephone ratepayers from the risk of

⁶⁴ MCF, pp. 4-5.

⁶⁵ MCF, p. 34.

⁶⁶ "Order of the Commission Regarding its Investigation into Southern Bell Telephone and Telegraph Company's Trial Provision of MemoryCall Service," Georgia Public Service Commission, Docket No. 4000-U. The opinion notes similar problems in Florida.

competitive ventures, provision of resources to monitor abuses and resolution of outstanding complaints about cross-subsidization. In particular, MCF stresses the transactional abuses that can, and have arisen.

The Department of Justice has suggested at least one set of inquiries to demonstrate the separate subsidiary requirement. It suggests business plans and agreements should be reviewed.

The BOCs must provide in-region interLATA services in accordance with the separate affiliate requirements of s272. In order to evaluate compliance with this requirement, it will be useful to review business plans, organizational documents, agreements, or other evidence that shows that the BOCs will provide any authorized in-region interLATA services through one or more affiliates that are separate from any operative company entity that is subject to the requirements of Section 251[c] for as long as such affiliates are required, and that such affiliates will meet all of the structural and transactional requirements of Section 272 (b).⁶⁷

The Department of Justice has identified one important structural area of concentration -- facilities used to provide interLATA long distance.

It is also important to consider the means by which the BOC plans to provide interexchange services during the period for which the separate subsidiary requirements of Section 272 are in effect, including agreements to resell services of interexchange carriers, plans to provide interLATA services over existing BOC facilities, or plans to construct new facilities.⁶⁸

The failure of the RBOCs to put structural safeguards in place and the difficulty of implementing non-structural safeguards has led for the call to require implementation before requests for entry are made. Mechanisms for monitoring the implementation of the safeguards and resolution of outstanding complaints are also considered crucial if they are to accomplish their goal.

We view this requirement to be of crucial importance, because structural and

⁶⁷ DOJ, 271 Information, p. 8.

⁶⁸ DOJ, 271 Information, p. 9.

non-discrimination safeguards of section 272 seek to ensure that competitors of the BOCs will have non-discriminatory access to essential inputs on terms that do not favor the BOC's affiliates. These safeguards further discourage, and facilitate detection of, improper cost allocation and crosssubsidization between the BOC and its section 272 of affiliate. The safeguards, therefore, are designed to promote competition in all telecommunications markets, thereby fulfilling Congress is fundamental objective in the 1996 Act...

Section 271 (d) (3) (B) requires the commission to make a finding that the BOC applicant will comply with section 272, in essence of predictive judgment regarding the future behavior of the BOC. In making this determination we will look to past and present behavior of the BOC applicant as the best indicator of whether it will carry out the requested authorization in compliance with the requirements of section 272. Moreover, section 271 gives the commission the specific authority to enforce the requirements of section 272 after in-region interLATA authorization is granted.

For the reasons set forth below, we conclude that based on its current in past behavior, Ameritech has failed to demonstrate that it will carry out the requested authorization in accordance with the requirements of section 272.⁶⁹

Ameritech undertook a series rather blatant steps to try to skirt the requirements of section 272.

In order to avoid the requirement for separate boards of director, Ameritech had no boards. Essentially, its local and long distance operations were presented as rudder less,captainless ships. The FCC rejected this ruse, arguing that companies must be considered to have direction and finding that under state law the stockholders must be construed as the Board of Directors for each of the companies.⁷⁰ Consequently, the companies have the same Board of Directors.

In order to avoid public disclosure as required by the act Ameritech transferred assets on

⁶⁹ FCC Michigan, paras. 346...347...348.

⁷⁰ FCC Michigan, para. 349.

paper or left out the price at which goods in services were transact it, claiming that price was not necessary as part of the public disclosure. The FCC rejected this approach.⁷¹

Ameritech proposed truly remarkable language for a telemarketing script which was intended to ensure that its long distance affiliate would gain no competitive advantage when customers interact with the incumbent local exchange company. It read as follows:

You have a choice of companies, including Ameritech long distance, the long distance service. Would you like me to read from a list of other available long distance companies or do you know which company you would like.⁷²

There have also been complaints by competitors of refusals to offer services to selected competitions⁷³ and counter selling by the company.⁷⁴ That is, the company targets individuals in the process of changing service providers to try to win them back, based upon proprietary information that must be given to Ameritech to make the change.

The FCC rejected all of these practices, but these behavior abuses of affiliate relations underscores how difficult it will be, even when all the technical conditions of opening markets are met, to ensure a level playing field for new entrants competing against a hundred year old monopoly.

⁷¹ FCC Michigan, paras. 363, 367, 373.

⁷² FCC Michigan, para. 375.

⁷³ FCC Michigan, para. 377.

⁷⁴ FCC Michigan, para. 379.

VII. THE PUBLIC INTEREST

The public interest test is largely undefined in the 1996 Act and the accompanying report. The only mention is to require the FCC to make a public interest determination and to base its decision on "substantial evidence on the record as a whole." Further, the Department of Justice is given broad latitude in its evaluation of the request for entry. The Conference report mentions specifically (1) the House standard, (2) the standard included in the AT&T consent decree, "or (3) any other standard the Attorney General deems appropriate.

Although some have sought to downplay the importance of the public interest test, that approach is not supported by the law or the legislative history.⁷⁵ The fact that Congress added a broad public interest standard to the 1996 Act is seen by the Department of Justice as an

⁷⁵ Turetsky, David, "Bell Operating Company InterLATA Entry Under Section 271 of the Telecommunications Act of 1996: Some Thoughts," before the Communications Committee of the National Association of Regulatory Commissioners, July 22, 1996, pp. 19-20.

In view of this history and Congressional policy it is especially curious that, since enactment of the new law, it has been suggested in certain quarters that the public interest requirement might be less significant in section 271 than in other context and that it may be just some sort of gratuitous restatement of the competitive checklist, presumed to be satisfied whenever the checklist is. I would like to put that notion to rest...

The equally critical importance of the public interest requirement is unmistakable. Its importance is not only reflected in the express terms of the statute itself, where the requirement is given co-equal billing with the checklist and the other requirements that the Bells must establish that they satisfy. It is also indicated time after time in the legislative history. Members whose support was absolutely essential to the new law's passage made it clear that an independent public interest requirement, of at least the breadth that public interest requirements - and with emphasis on its competition component -- generally have before commissions such as the FCC, was essential to their support. It was also an important consideration for President Clinton in signing the new law.

important step.⁷⁶ The FCC took this view as well.

As discussed below, we believe that section 271 grants the commission broad discretion to identify and weigh all relevant factors in determining whether BOC entry into a particular in-region, interLATA market is consistent with the public interest. Before making a determination of whether the grant of a particular section 271 application is consistent with the public interest, we are required to consult with the Attorney General, and to give substantial weight to the Attorney General's evaluation...

The Communications Act is replete with provisions requiring the commission, in fulfilling its statutory obligation to regulate interstate and foreign communications by wire and radio, to assess whether particular actions are consistent with the public interest, convenience, and necessity. Courts have long held that the Commission has broad discretion in undertaking such public interest analyses...

The legislative history of the public interest requirement in section 271 indicates that Congress intended the commission, in evaluating section 271 applications, to perform its traditionally broad public interest analysis of whether a proposed action or authorization would further the purposes of the Communications Act. We also conclude that Congress granted the Commission broad discretion under the public interest requirement in section 271 to consider factors relevant to the achievement of the goals and objectives of the 1996 Act. Moreover, requiring petitioning BOCs to satisfy the public interest prior to obtaining in-region, interLATA authority demonstrates, in our view, that Congress did not repeal the MFJ in order to allow checklist compliance alone to be sufficient to obtain in-region, interLATA authority...

In adopting section 271, Congress mandated, in effect, that the commission not lift the restrictions imposed by the MFJ on BOC provision of in-region, interLATA services until the commission is satisfied on the basis of an adequate factual record that the BOC has undertaken all actions necessary to assure that its local telecommunications market is, and will remain, open to competition.⁷⁷

⁷⁶ DOJ, SBC, p. 39.

The "public interest" standard under the Communications Act is well understood as giving the Commission the authority to consider a broad range of factors and the courts have repeatedly recognized that competition is an important aspect of the standard under federal telecommunications law.

⁷⁷ FCC Michigan, paras. 383, 384, 385.

Putting aside the effort to downplay the significance of the public interest test, controversy has arisen over both the process of reaching the broad conclusions about whether entry serves the public interest and the substantive criteria by which the conclusion will be reached.

A. FULL EVIDENTIARY BASIS FOR DECISION MAKING

The evidentiary basis required by the 1996 Act has led The Oklahoma Attorney General to complain about the process of decision making in that state. The hearing process was deficient, in the opinion of the AG.

At that evidentiary hearing before the Administrative Law Judge and at the hearing on appeal before the OCC *en banc*, the Oklahoma Attorney General argued that "in order to *verify* the compliance of the Bell operating company with the requirements of subsection [c]," 47 U.S.C. s271(d)(2)(B), the FCC envisions that the OCC consultation be based upon a reliable evidentiary foundation. Based upon this and upon the fact that the OCC proceeding conducted to determine if SBC satisfies s271 fits within the state law definition of an "individual proceeding," Okla. Stat tit. 75 s250.3(7), the OCC's procedural rules for conducting O.C. adjudications, which include the examining and cross examining of witnesses and adherence to the rules of evidence should be enforced.⁷⁸

The Department of Justice also underscores the important role that independent review of the facts of the case by each entity charged with review of the application should exercise in its criticism of the Oklahoma Corporations Commission compilation of evidence and reading of the law.

In this case, however, the OCC majority did not adopt detailed factual findings concerning the checklist compliance issues, and their conclusions appear to rest, in large part, on what we believe to be an incorrect legal interpretation of the checklist.⁷⁹

⁷⁸ AG Oklahoma, p. 3.

⁷⁹ DOJ, SBC, p. 26.

RBOC efforts to restrict the nature of the hearing at the state have been vigorous, with many parties excluded for proceedings under section 251 and 271. If the states fail to build a full evidentiary record, then the Department of Justice and the FCC will have to build a record of its own. The Attorneys General have echoed this concern.⁸⁰

The FCC has expressed similar concerns. It defined the standard to be applied as a preponderance⁸¹ of sworn⁸² evidence in the record.⁸³

B. COMPETITIVE STANDARD

The Department of Justice underscored the fundamental competition analysis which must be the basis of any ultimate finding on authorization of RBOC entry. The Department of Justice stresses the distinction between the minimum conditions set out in parts of section 271 and the broader public interest test. DOJ concludes that Congress clearly made a distinction between threshold conditions and an overall reading of the public interest.

⁸⁰ Attorneys General, p. 3.

The Commission must also consider the extent to which it can rely upon the consultation provided by the Oklahoma Corporation Commission in this proceeding. If the Oklahoma Commission has fallen short in its review of SBC's compliance with the competitive checklist set forth in section 271(c)(2)(B) of the 1996 Act, it is incumbent upon the Commission to say so. Otherwise, the Commission runs the risk of undermining the work of public utility commissions (PUCs) in other States that, often with the assistance of the State's Attorney General's office, have undertaken or will undertake thoroughgoing reviews of their local BOC's compliance with the requirements of section 271. A Commission decision that appears to sanction Oklahoma's level of scrutiny will endanger PUC efforts in other States to conduct more detailed reviews.

⁸¹ FCC Michigan, para. 46.

⁸² FCC Michigan, para. 47.

⁸³ FCC Michigan, para. 152.

Congress supplemented the threshold requirements of Section 271, discussed in Parts II and III above, with a further requirement of pragmatic, real world assessments of the competitive circumstances by the Department of Justice and the Commission. Section 271 contemplates a substantial competitive analysis by the Department, "using any standards the Attorney General considers appropriate. The Commission, in turn, must find before approving an application that "the requested authorization is consistent with the public interest, convenience, and necessity," and, in so doing, must "give substantial weight to the Attorney General's evaluation." The Commission's "public interest" inquiry and the Department's evaluation thus serve to complement the other statutory minimum requirements, but are not limited by them...

In vesting the Department and the Commission with additional discretionary authority, Congress addressed the significant concern that the statutory entry tracks and competitive checklist could prove inadequate to open fully the local telecommunications markets.⁸⁴

Without specifying a precise standard, DOJ concludes that competition must be meaningful, real, nontrivial, substantial, and irreversible. At the key point in its response, DOJ uses the term substantial competition.⁸⁵ In other places, DOJ and its experts refer to meaningful

⁸⁴ DOJ, SBC, p. 38.

⁸⁵ DOJ, SBC, pp. 41-42.

The public interest in opening local telecommunications markets to competition also requires that the Commission deny SBC's interLATA entry application. SBC does not presently face substantial local competition in Oklahoma, despite the potential for such competition and the expressed desire of numerous providers, including some with their own facilities, to enter the local market... SBC's failure to provide adequate facilities, service and capabilities for local competition is in large part responsible for the absence of substantial competitive entry. If SBC were to be permitted interLATA entry at this time, its incentives to cooperate in removing the remaining obstacles to entry would be sharply diminished, thereby undermining the objectives of the 1996 Act.

In performing its competitive analysis, the Department seeks to determine whether the BOC has demonstrated that the local market has been irreversibly open to competition. To satisfy this standard, a BOC must establish that the local markets in the relevant states are fully and irreversibly open to the various types of competition contemplated by the 1996 Act -- the construction of new networks, the use of unbundled elements of the BOC's network, and resale of BOC services... In applying this standard, the Department will look first to the extent to which competitors are entering the market. The presents of commercial competition at a nontrivial scale both (1) suggests that the market is open; and (2) provides

competition and real competition.⁸⁶ Thus, we have a series of adjectives far beyond the simple condition set out in section 271 [c](1).

The Oklahoma Attorney General uses the term meaningful as well, but applies it to the 271 [c](1) condition

The reason such a "competing provider" is required to be "unaffiliated," obviously, is to prevent a BOC from getting interLATA authority when its only competitor in its local market is a bogus competitor. In other words, Congress intended there to some meaningful competition in the BOC's local market as a prerequisite to interLATA entry.⁸⁷

The Department of Justice's analysis focuses primarily on the behavior of competitors. Are they actually entering and at what scale. The Michigan Consumer Federation comments in the Ameritech application suggest that an equally legitimate area of analysis should be broader incumbent behavior in the marketplace. If competition is real or meaningful, it must be affecting incumbent behavior in a number of areas. Entry, on which the Department of Justice focuses, is only one indicator of the competitive status of the market.

It is premature to reward Ameritech Michigan with long distance entry under Sec 271 because the local bottleneck has not yet been broken pursuant to Sec. 251. If the local Michigan market were competitive, relevant indicators suggest that customers would be switching to other providers; historic monopoly rates would be going down; innovations, expanded services options and service quality would be increased. Instead it is clear that the local bottleneck has not been broken.⁸⁸

The Department of Justice has recently pointed out the failure of competition to spread

an opportunity to benchmark the BOC's performance so that regulation will be more effective.

⁸⁶ DOJ, SBC, p. 51.

⁸⁷ AG Oklahoma, p. 3.

⁸⁸ DOJ, Michigan, pp. 32...33.